UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

BUD OF CALIFORNIA, INC.,
d/b/a BUD OF CALIFORNIA, A WHOLLY OWNED SUBSIDIARY OF DOLE FRESH VEGETABLES, INC.

(Yuma, Arizona and Various Locations in California)

Employer

and

Case 32-RC-5580

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 5, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer provides cold-storage services for bagged lettuce and vegetables from refrigerated warehouses called "coolers" in Castroville, Huron, Gonzalez, and Marina, California and in Yuma, Arizona.[1] The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's non-supervisory cooler and cold room employees. A hearing officer of the Board held a hearing and the parties filed post-hearing briefs.

As evidenced at the hearing and in their briefs, the parties disagree on: (1) whether the cooler and cold room unit (herein referred to as the cooler unit or cooler employees) must include maintenance employees; (2) whether the working foremen are statutory supervisors; and (3) whether to delay the election pending the operational peaks of the Employer's cooler facilities. The Employer contends that a separate cooler unit is inappropriate and that the appropriate unit must include cooler and maintenance employees, and it contends that working

[1] The Gonzalez facility is owned by Dole Carrot Company, a wholly owned subsidiary of Dole Fresh Vegetables, Inc., the Employer's parent company.

foremen in the cooler and maintenance departments are non-supervisory employees who are properly included in a cooler and maintenance unit. The Employer also proposes three different election dates corresponding to the seasonal peaks at each of its facilities. Conversely, the Union argues that the cooler employees do not share a sufficient community of interest with the maintenance employees so as to require the inclusion of the maintenance employees in the unit, and that working foremen are properly excluded from the unit as supervisors within the meaning of Section 2(11) of the Act.[2] The Union also contends that a single election date is appropriate and that the election be held without delay because a full complement of the Employer's employees are currently working with only approximately five employees from the Employer's Yuma, Arizona facility currently on layoff status.

I have carefully considered the evidence and arguments presented by both parties on these issues. As set forth below, I conclude that the cooler employees constitute a sufficiently distinct and homogenous group with interests separate and apart from the Employer's maintenance employees such that a unit limited to cooler employees is an appropriate unit. I further find that the evidence does not establish that working foremen in the cooler department possess statutory supervisory authority, and I shall include them in the unit found appropriate herein. Finally, I find no basis to delay the election and hereby direct a mixed manual-mail election with ballots mailed to the approximately five employees who are in layoff status at the Employer's Yuma facility. There are approximately 176 employees in the unit found appropriate.

[2] The Petitioner amended its petition at the hearing as follows: All full-time and regular part-time seasonal and year-round cooler and cold room employees, employed by the Employer at its facilities located in Marina, Castroville, Huron, California, and Yuma, Arizona, excluding all agricultural employees, all employees currently covered by a collective-bargaining agreement, sales employees, office and clerical employees, guards and supervisors as defined in the Act. The Employer and the Petitioner stipulated that this unit, at a minimum, is an appropriate unit. After the hearing closed, the parties further agreed to include the employees employed at the Gonzalez facility in the unit.

OVERVIEW OF EMPLOYER'S OPERATIONS

The Employer, a California corporation, provides cold storage services for bagged lettuce and other vegetables, such as broccoli, celery, cauliflower and leaf lettuce, at its five facilities. The Employer does not perform any processing on the vegetables, which are packed in the field and transferred to the Employer's facilities for cooling, storage, and shipping. The operations do not vary significantly among the facilities and the work performed by the employees at each facility is substantially similar. The Employer's cooler employees unload the vegetables products upon their arrival at the Employer's facilities, and the vegetables are cooled and stored until reloaded by cooler employees onto customer's trucks from the Employer's docks.[3] The Employer's maintenance employees perform mechanical and electrical repairs and maintenance upon the Employer's cooling devices, forklifts and other equipment, as well as minor building maintenance. There is no contention that the cooler employees play any role in assisting maintenance employees to perform their maintenance or repair functions, and maintenance employees do not perform any cooler work.

With the exception of the Employer's Marina facility, which operates throughout the year, the Employer's facilities operate at different times of the year depending upon the growing seasons of the crops which are handled by each of the facilities. For example, the Employer's facility in Gonzalez handles lettuce, broccoli, and celery and operates from March to November; the Employer's facility in Yuma operates from late-November or early-December until July; the Huron facility has two growing seasons and operates from March 15th through April 20th and from October 15th through November the 20th.[4] Thus, the number of employees working at each facility varies depending upon the growing season and, as noted below, the number of cooler employees who transfer from facility to facility based on the growing season. At the peak

[3] The Marina facility is the only facility which operates a computerized automatic storage and retrieval system (ASRS) instead of forklifts to move and retrieve products.

[4] The record is unclear regarding the duration of the Castroville growing season.

of the most recent growing seasons, the Employer employed 132 employees at Marina; 28 employees at Castroville; 26 employees Gonzales; and 118 employees at Yuma; 31 employees during the Huron spring season; and 27 employees during the Huron fall growing season.

At the end of the growing season, the Employer uses a private contractor to transfer its portable vacuum cooling equipment from one of its facilities to another. The Employer's maintenance employees accompany the equipment to assist in the assembly and set-up of the equipment at the new location. Many of the Employer's cooler employees transfer from one facility to another following the close of the growing season at a particular facility but they play no role in moving equipment.

The director of cooling operations, who is employed by the Employer's corporate parent, has overall responsibility for the five facilities. The corporate human resources manager assists the director of cooling operations and handles many personnel issues for employees employed at the five facilities. However, each facility has a plant manager, also referred to as a "dock supervisor" at some facilities, who oversees the daily operations of the facility and has authority to handle a variety of personnel and disciplinary issues without involving the corporate human resources manager. At some of the facilities, cooler employees are also supervised by dock supervisors, receiving supervisors, receiving manager, warehouse managers, and shift supervisors. Maintenance department employees are separately supervised by a maintenance manager and a maintenance supervisor.

The Cooler Employees

There are currently 176 cooler employees, including forklift drivers, loaders, pickers, consolidators, and working foremen.[5] The cooler employees are hourly employees who participate in the Employer's piece rate program. Thus, in addition to an hourly rate, these employees receive the piece rate, which is calculated by multiplying the total shipped volume

[5] Because some customers may want products that do not take up a full pallet, it is the responsibility of the pickers and consolidators to properly combine the various products onto the same pallet.

times the piece rate;[6] this sum is then divided by the total hours worked by eligible employees. The hourly rate for cooler employees varies among the facilities; cooler employees at the Gonzalez facility receive lower hourly rates then their counterparts at the other facilities and are not eligible to participate in the Employer's 401K plan profit sharing plan. Regardless of classification, all the Gonzalez cooler employees receive approximately $13.00 an hour; cooler employees employed at Castroville, Marina, and Yuma receive an average of approximately $16.50 an hour; and Huron cooler employees receive an average of approximately $15.50 an hour.[7]

Working foremen receive approximately $4.00 an hour more than the other cooler employees and spend approximately 50 percent of their time performing cooling work, such as loading or unloading trucks. It appears that the balance of their time is spent on duties such as checking temperatures, monitoring break and lunch times, observing the loading process to ensure that customers are not receiving damaged product, and conveying instructions from shift supervisors to cooler employees. Working foremen do not prepare the schedules for cooler employees and, as discussed below, the record does not establish that they exercise any significant supervisory authority. Yet, working foremen are the highest ranking person at a facility for about two to four hours on weekday evenings after the supervisors go home, and there are no supervisors present at the Yuma facility from 6:00 p.m. until midnight on Saturdays and Sundays. However, it appears that working foremen are required to contact the director of cooling operations if significant issues of any kind arise when the supervisors are not present.

The Maintenance Employees

There are approximately 25 maintenance employees, including 5 maintenance working foremen, employed at the Employer's facilities. The maintenance manager is in charge of the

[6] The piece rate at the Gonzalez facility is a penny per carton and three cents per carton at the other facilities.

[7] The average hourly rates set forth above include the piece rate.

maintenance departments; he handles disciplinary issues, and scheduling for the maintenance employees employed at the Employer's facilities. There is one maintenance supervisor who reports to the maintenance manager who in turn reports to the director of cooling operations. The maintenance manager and the maintenance supervisor have offices at the Marina facility, but the maintenance supervisor spends approximately 90 percent of this time traveling to the other four facilities to monitor the maintenance departments. At each of the facilities, the maintenance department is located in a separate maintenance area where maintenance employees store their personal tools, and the cooler employees do not possess keys to these maintenance areas. Maintenance employees do not receive any piece rate because they do not perform any loading, storing, or cooling functions. There are eight separate wage classification within the maintenance department with corresponding hourly rates ranging from $10.00 to $28.00 an hour. Currently, two maintenance employees are receiving the highest wage rate, while there are no maintenance employees receiving the lowest wage rate. About one-third of the maintenance employees commute to work in the Employer's vehicles and are provided with fuel pump cards to buy gasoline. [8]

Bargaining History[9]

The Employer's predecessor, Bud Antle, Inc., had a collective-bargaining relationship with the Petitioner's predecessor, Fresh Fruit and Vegetable Workers Local 1096, United Food & Commercial Workers International Union, since about 1976, with the Petitioner's predecessor representing a unit which included the Employer's cooler employees, maintenance employees and working foremen at the Employer's facilities in Arizona and California. The last collective-bargaining agreement between the parties was effective from 1986 though 1989, and it initially included unit employees at approximately seven facilities in California. The bargaining unit

[8] The record does not contain significant information regarding the wage rates or additional duties of the working foremen in the maintenance department. However, they spend approximately 75 percent of their time performing regular maintenance work.

[9] I take administrative notice of the Board's decision in *Bud Antle, Inc.*, 347 NLRB 87 (2006).

employees commenced an economic strike in August 1989, which the Employer responded to by hiring temporary replacements and locking out employees in November 1989. The lockout lasted approximately 14 years. In mid-2003, Teamsters Local 890 began an organizing campaign among the replacement employees. On August 6, 2003, the Teamsters filed a petition in Case 32-RC-5174 to represent these employees. Pursuant to a Stipulated Election Agreement executed by the Employer, the Union's predecessor, and the Teamsters, the Region conducted a mail ballot election. On December 3, 2003, a tally of ballots was issued which showed that neither union received a majority of the 253 ballots cast during the election, and on December 15, 2003, I issued a certification of results of the election.

ANALYSIS OF COMPOSITION OF THE UNIT

The Board has long found that units may be appropriately based on craft status, or where, as here, the requested employees are a clearly identifiable and homogenous group with a community of interest separate and apart from other employees. In making unit determinations, the Board considers whether a community of interest exists, and examines such factors as mutuality of interests in wages, hours and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. See, e.g., *Yuengling Brewing Co. of Tampa*, 333 NLRB 892 (2001). However, the Board does not permit the arbitrary, heterogeneous, or artificial grouping of employees. *Moore Business Forms, Inc.,* 204 NLRB 552 (1973); *Glosser Bros., Inc.,* 93 NLRB 1343 (1951). While the Board considers prior bargaining history, the weight given to a prior history of collective bargaining is not "conclusive." *Alley Drywall, Inc.,* 333 NLRB 1005 (2001). To the contrary, the Board emphasize that each case turns on its own facts, and that "the effect of any one factor, and therefore the weight to be given it in making the unit determination, will vary from industry to industry and from plant to plant." *American Cynamid Co.,* 131 NLRB 909 (1961).

I conclude that the balance of factors establishes that the petitioned-for unit of cooler employees is an appropriate unit. Here, the Employer's overall operations are not so integrated as to have eliminated the cooler employees' separate identity. To the contrary, the cooler employees function separately from the maintenance employees and the two groups of employees are readily identifiable and operationally distinct, with separate lines of supervision and seniority systems. The cooler employees do not perform any maintenance work and there is no evidence that they posses the particular skills required by the maintenance employees or participate in any training, such as the welding or refrigeration classes provided by the Employer to the maintenance employees. Similarly, the maintenance employees do not perform any cooling work. There is no evidence of temporary transfers, and only one instance of a permanent transfer of a cooler employee to the maintenance department within the past five years.[10] Nor is there any evidence of significant work-related contact between the two groups, not even when making repairs.[11] While there are some similarities in the benefits and terms and conditions of employment, the two groups have different methods of compensation, different wage rates, different travel allowances, and cooler employees are not provided with company vehicles or fuel cards. The maintenance employees command the highest wages among the hourly employees, with the highest wage rate of $28.00 an hour substantially higher than the highest cooler wage rate of $16.50 at Castroville, Marina, and Yuma. The maintenance employees' higher pay scale also reflects the higher skill level of the maintenance employees.[12]

[10] The Union's brief refers to two instances of permanent transfers but this assertion is not supported by the record.

[11] For example, the maintenance employees do not change the electric batteries in the forklifts operated by cooler employees. Depending upon the facility, this work is performed by an outside contractor or by the forklift drivers themselves.

[12] *See e.g. Phillips Products Co.*, 234 NLRB 323 (1978) (separate maintenance unit appropriate where maintenance employees received the highest wages among hourly positions.)

In its brief, the Employer relies on cases noting the Board's reluctance to disturb a historical bargaining unit without compelling reasons. These cases are not persuasive in the absence of an ongoing bargaining relationship. While the bargaining history in the instant case arguably supports the inclusion of the maintenance employees, the facts do not warrant this result where the bargaining relationship effectively ceased in 1989 and where the Board has noted the existence substantial changes in the job functions and operations at the Employer's facilities from 1989 to 2003.[13] Accordingly, I conclude that, in the absence of an existing relationship, the bargaining history does not outweigh the other factors which establish that the cooler employees are readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation from the maintenance employees. *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1022-24 (1994), enfd. 66 F.3d 328 (7th Cir. 1995); *Sundor Brands, Inc.*, 334 NLRB 755 (2001).

ANALYSIS OF SECTION 2(11) STATUS

The traditional test for determining supervisory status is: (1) whether the employee has the authority to engage in, or effectively recommend, any of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571, 573-574 (1994). *See Oakwood Health Care, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.,* 348 NLRB No. 38 (2006); and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006). The burden of proving supervisory status lies with the party asserting that such status exists and must be established by a preponderance of the evidence. *Oakwood Health Care, Inc.,* supra, slip op. at 9*; NLRB v. Kentucky River*

[13] Among other things, the 1986-1989 collective-bargaining agreement initially included seven other facilities in California. The Board also noted that the Employer's operations had changed significantly enough that the unit employees needed to be trained on all aspects of the Employer's modernized operations. *Bud Antle, Inc.,* 347 NLRB at 91.

Community Care, Inc., 532 U.S. 706, 711-712 (2001). Here, the Petitioner contends that working foremen have authority within the meaning of Section 2(11) of the Act to assign work and to discipline employees. The Petitioner does not contend nor does the record reflect that working foremen have the authority to hire, fire, transfer, lay off, recall, or promote employees. As discussed below, I conclude that working foremen at best, are minor lead persons whom the Employer has not vested with "genuine management prerogatives" and who lack true supervisory authority. *Quadrex Environmental Co.,* 308 NLRB 101, 102 (1992) (citing *S. Rep. No. 105, 80th Cong.,* 1 Sess. 4 (1947)).

Assignment of Work

The working foremen's' role in assigning work does not demonstrate statutory supervisory status. Assignment means designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties as opposed to discrete tasks. *Oakwood Health Care, Inc.,* 348 NLRB No. 37, slip op. at 4 (2006); *Golden Crest Healthcare Center, 348* NLRB No. 39 (2006). However, the authority to make an assignment, by itself, does not confer supervisory status. To establish supervisory authority requires the individual to use independent judgment when making such assignments. This means that the individual must exercise authority that is free from the control of others, and make a judgment that requires forming an opinion or evaluation by discerning and comparing data, thus judgment is not independent if it is dictated or controlled by detailed instructions. Additionally, the judgment must "rise above the merely routine or clerical" for it to be truly supervisory, even if it is made free of control of others and involves forming an opinion by discerning and comparing date. Id., slip op. at 8-9.

The Petitioner contends that working foremen exercise supervisory authority to assign by allowing cooler employees to go home when their work is finished and assigning overtime. However, the Petitioner has not met its burden of establishing that working foremen use the requisite degree of independent judgment in making any such assignments. Here, the

Employer allows employees to leave when there are no more orders to be picked or no more vegetables to load or unload after notifying the working foremen. Thus, in determining that job is complete and that the employees can go home, the working foremen do not exercise significant discretion, since the decision is based upon common sense efficiencies in accordance with the Employer's practice and does not rise above the routine or clerical. *See Training School at Vineland,* 332 NLRB 1412, 1417 (2007).

Similarly, working foremen do not prepare the work schedules for cooler employees and they do not exercise independent judgment when advising loaders when to report to work based upon the arrival schedule of the customer's trucks. The evidence establishes that the Employer operates a computerized appointment system whereby the customer calls for an appointment, and the Employer provides the truck driver with a scheduled appointment time depending upon the product availability and loading capacities. The loaders are scheduled to call the Employer at appointed times in order to determine when to report to work, but the working foremen do not prepare these schedules. If the supervisor is not present when the loader calls, the working foremen will consult the computerized appointment system to determine when the trucks are scheduled to arrive at the Employer's facility and to advise the loader what time to report to the Employer's facility. The record does not establish that working foremen use discretion to determine the number of loaders required to load or unload a particular truck or to assign a particular employee to a particular truck. Thus, the working foremen do not conduct an individualized assessment of a loader's skill against the Employer's particular needs. Nor does the record establish that foremen can insist that employees report to work when they request time off for a medical appointment. In these circumstances, it is evident that working foremen do not exercise any assignment authority which requires the use of independent judgment sufficient to confer supervisory status.

Working foremen also lack independent judgment to authorize overtime. The director of cooling operations testified that working foremen rarely assign overtime, and that on the

occasions when they do, the overtime is authorized in accordance with instructions received from the shift supervisors in order to even-out the work load. The Employer provides its supervisors with a weekly printout out the number of hours worked by the employees in every classification which is used as a guide to determine overtime assignments, as the Employer attempts to distribute overtime equally among the workforce. The supervisors provide instructions to the working foremen with respect to the eligibility for overtime based upon the number of hours worked by the coolers employees. The supervisors are directed to distribute overtime equally among the employees and similarly instruct the working foremen as to who should receive overtime. Accordingly, I conclude that there is insufficient evidence that working foremen use significant discretion in determining whether to award overtime or to whom the overtime is awarded. Authority is not evidence of supervisory status where the discretion is circumscribed by the supervisor's instructions and therefore does not require independent judgment.

In sum, the record lacks evidence that working foremen exercise any authority which requires the use of independent judgment sufficient to confer supervisory status.

Discipline/Effective Recommendation of Discipline

The record does not demonstrate that working foremen discipline employees on their own authority or otherwise exercise disciplinary authority that leads to personnel actions without the independent investigation or review by higher management personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Children's Farm Home*, 324 NLRB 61 (1997). There is no documentary evidence of discipline either issued by working foremen or resulting from their recommendation. The Petitioner relies heavily upon testimony that working foremen can deliver a warning letter, which has been authorized by the supervisor, to an employee, and that the signature of the working foremen may appear on the warning letter. However, the director of cooling operations testified that working foremen do not have authority to issue disciplinary warning letters on their own authority, and there is no evidence to the contrary. The record

does not establish that working foremen initiate the process of issuing the notice of warning, much less that their signature constitutes an effective recommendation, thus, it is unclear whether the signature simply indicates that the foremen serve as a witness. Nonetheless, the Petitioner argues without citing authority that absence of evidence on this point demonstrates supervisory status. Contrary to the Petitioner's argument, the lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1048 (2003); *Michigan Masonic Home*, 332 NLRB 1409 (2000). "[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, supra, slip op. at 5; *Avante at Wilson*, 348 NLRB No. 71, slip op. at 2-3 (2006); *Sears, Roebuck & Co*., 304 NLRB 193, 194 (1991). Further, the Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital - Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997). Thus, I am unable to conclude that working foremen participate in the Employer's disciplinary process to a degree that confers supervisory status.

Finally, the Board insists upon evidence sufficient to establish a finding of actual statutory authority, and supervisory status cannot be established solely by secondary indicia. *Ken-Crest Services,* 335 NLRB 777, 779 (2001). Thus, the fact that working foremen are sometimes the highest ranking employee at a facility is not sufficient to establish statutory authority in the absence of statutory indicia. Moreover, the director of cooler operations testified that working foremen do not posses the same authority as the supervisors and they contact him with any problems or issues when the supervisors are not present. Similarly, the fact that

working foremen spend approximately 50 percent of their time performing lead duties does not establish that these lead tasks are supervisory. Thus, supervisory status is not established without evidence that working foremen exercise supervisory authority during the periods when supervisors or managers are not present at the plant or when they are not performing the same work as the other cooler employees.

TIMING OF THE ELECTION

The Employer proposes that the election be held on three separate dates which are at or near the peak of the Employer's seasons, with the first session in October 2008, at the facilities located in Marina, Castroville, and Gonzalez, California; the second session in November 2008, at the Huron, California facility; and the third session in December 2008, at the facility located in Yuma, Arizona. The Union objects to any delay and proposes that an election be conducted shortly after the Huron facility opens in mid-October, 2008.[14] It is not appropriate to delay the election when the parties agree and the record demonstrates that there are only seven employees from the Yuma, Arizona, facility who are not currently working at other facilities; only five of whom are eligible to vote in the unit found appropriate herein. Therefore, it is appropriate to mail ballots to these five employees given that they are widely scattered, with a distance of approximately 450 miles between the Yuma and Huron facilities.

CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

[14] There are currently 8 employees in layoff status from the Huron facility who are not working at another facility. However, these employees will be working when the Huron facility opens. The Employer's director of cooling operations testified that the Huron facility could reach its full complement around October 22-25, 2008.

2. The parties stipulated, and I find, that Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The Petitioner claims to represent certain employees of the Employer.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time seasonal and year-round cooler and cold room employees, including working foremen and dispatchers[15], employed by the Employer at its facilities located in Castroville, Huron, Gonzalez, and Marina, California, and Yuma, Arizona; excluding agricultural employees, employees currently covered by a collective-bargaining agreement, sales employees, maintenance department employees and working foremen, office clerical employees, guards, and supervisors as defined in the Act.

There are approximately 176 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **United Food and Commercial Workers Union, Local 5, United Food and Commercial Workers International Union.** The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

[15] At the hearing, the parties stipulated that the dispatchers are cooler employees who are included in the unit.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized

(overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must by received in Region 32, 130 Clay Street, Room 300N, Oakland, California, 94612-5211, on or before **October 9, 2008.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, **www.nlrb.gov**[16]**,** by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of the list will continue to be placed upon the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact Region 32.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the 12.01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice.

[16] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web sit, www.nlrb.gov.

Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **October 16, 2008**. The request may be filed electronically through the Agency's website, www.nlrb.gov[17], but may not be filed by facsimile.

Dated: October 2, 2008

Alan B. Reichard, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

32-1343

[17] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web sit, www.nlrb.gov.